

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATION BOARD
REGION 9

ATC

Employer

and

Case 9-RC-17804

TRANSPORT WORKERS OF AMERICA,
LOCAL 212, AFL-CIO ^{1/}

Petitioner

**ACTING REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION**

The Employer, a “paratransit” transportation company, is engaged in the business of transporting individuals with disabilities in and around Columbus, Ohio. The Petitioner has filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent, as part of the currently recognized driver unit, all dispatchers, mechanics and utility fuelers, employed at the Employer’s Columbus, Ohio facility. The Petitioner requests that a self-determination election be conducted to enable the dispatchers, mechanics and utility fuelers to choose whether to be included in the same unit and represented with the drivers. At the hearing in this matter, the Petitioner indicated that it is willing to proceed to an election in a separate dispatcher, mechanic and utility fueler unit if found appropriate.

A hearing officer of the Board held a hearing on the issues raised by the petition and the Employer and Petitioner filed briefs with me. Initially, the Employer contends that the petition should be dismissed because the parties previously agreed that the Petitioner would not seek to represent the employees covered by the petition. As will be shown, this contention lacks merit. The parties also disagree with regard to the unit placement of the five dispatchers, four mechanics, and two utility fuelers. The Employer, contrary to the Petitioner, asserts that the dispatchers are supervisors within the meaning of Section 2(11) of the Act, that the dispatchers, the mechanics and the utility fuelers do not share a community of interest with each other or the drivers, and that these classifications do not constitute an appropriate voting group for representational purposes with the drivers. Finally, the Petitioner, contrary to the Employer, asserts that Bobby Kerr, a mechanic, is a supervisor within the meaning of Section 2(11) of the Act. The parties agree that these are the only issues in dispute.

^{1/} The Petitioner’s name appears as amended at hearing.

I have carefully considered the evidence and the arguments presented by the parties and have concluded, as discussed below, that an election should be conducted to enable the dispatchers, mechanics and utility fuelers to choose whether to be included in the same unit as the drivers or to remain unrepresented. Accordingly, I have directed an election to determine whether the dispatchers, mechanics, and utility fuelers wish to be included in the current unit of drivers and to be represented by the Petitioner for collective bargaining.

An overview of the bargaining history of the parties and the Employer's operations provides the context for my discussion of the issues raised by the parties. I will then present, in detail, the facts and reasoning that support my conclusions.

I. BARGAINING HISTORY OF THE PARTIES

At the hearing, the Employer's Vice-President of Human Resources and Labor Relations, Kevin Healy, testified that during the negotiations for the drivers' contract, the Petitioner promised to refrain from seeking representation of the mechanics and dispatchers. However, Healy also testified that during the negotiations for the collective-bargaining agreement, the parties simply discussed who was and was not covered by the agreement. Section 3.1 of the collective-bargaining agreement notes that "all positions and classifications not specifically established in this Agreement, as being included in the bargaining unit, shall be excluded from the bargaining unit." There is no evidence of the express agreement by Petitioner that it would not seek to represent the mechanics, dispatchers or utility fuelers.

II. OVERVIEW OF OPERATIONS

The Employer contracts with the Central Ohio Transit Authority (COTA) (which provides public transportation in the City of Columbus) to provide transportation services (paratransit) for people with disabilities. When COTA certifies an individual as eligible for paratransit, his or her name is placed in a database called TRAPEZE and that person is permitted to call the Employer to request transportation. When a certified individual with a disability calls to request service, his request is taken by one of the Employer's customer service representatives.^{2/} Each customer's request for transportation is referred to as a "trip." The customer service representative inputs the trips into TRAPEZE, which organizes the trips and places them on "manifests." Each manifest is a series of trips assigned to a driver (drivers are also sometimes referred to here and in the record as "operators"). The manifests are transmitted to dispatch, where they are printed on the day of service. After the manifests are printed, they are placed in a binder along with a set of keys to a bus that will be used to transport the client. When the drivers come into work, the manifests and keys are handed out to the drivers by the road supervisors during the week and by the dispatchers on the weekends, if no "road supervisor" is on duty. The drivers then provide the requested transportation services.

^{2/} The parties agreed at the hearing that the customer service representatives should not be included in the voting group.

The Employer has 50 25-foot passenger vehicles with wheelchair lifts and two 5-passenger minivans with wheelchair ramps. There are 12 new vehicles and 38 older vehicles. The newer vehicles have room for eight ambulatory passengers and three wheelchairs, while the older vehicles have room for six ambulatory passengers and three wheelchairs. When not operating, the vehicles are stored in a large outdoor parking lot at the Employer's facility in Columbus, Ohio or in a 20,000 square foot enclosed area which houses a fuel tank and 25 to 30 vehicles.

Located at the Employer's facility is large 1-story building which houses all of the Employer's indoor facilities. Within the building, there is a lobby, a customer service and reservations area, an office for COTA's paratransit services manager, managerial offices, a "command room," a drivers' lounge, a dispatch office, and a garage where the mechanics repair and service buses. At the time of the hearing, all of the Employer's employees used the same parking lot on a first come-first served basis. However, the Employer indicated that it intends to segregate the parking by job classification in the future.

The Employer's managerial hierarchy consists of the general manager, Barton Davis, who is in charge of the Columbus operation and is the highest ranking manager on-site. Davis is the only official at the site with authority to terminate or promote employees. Reporting to Davis are the operations manager (a position which is currently vacant), the office manager/human resources (a position which is currently vacant), and Maintenance Manager Chris Morales. Safety/Training Manager Corwin Gibbs and Paratransit Operations Specialist III Mike Weidger will report to the operations manager. It is not clear from the record to whom they currently report. Reporting to the paratransit operations specialist III are Paratransit Operations Specialist II Ken Rollins, Paratransit Operations Specialist I James Sherrod, and Customer Service Supervisor Marsha Newman. The operations specialists I and II (who are also collectively referred to here and in the record as "road supervisors") work in the field assisting drivers, performing evaluations of drivers, and responding to traffic accidents, but also sometimes perform dispatch duties. The parties apparently agree that the Operations Specialists I, II and III are supervisors and I so find. The drivers report to the Paratransit Operations Specialist I. The dispatchers report to the Paratransit Operations Specialist II. The mechanics (also referred to here and in the record as maintenance technicians) report to the maintenance manager. The two utility fuelers, who clean up the yard and the shop and fuel the vehicles, report to one of the mechanics, Bobby Kerr. The six customer service representatives report to the customer service supervisor.

The Employer operates three shifts, which vary somewhat according to job classification. The mechanics work three shifts Sunday evening through second shift Friday from approximately 7 p.m. to 3 a.m., 3 p.m. to 11 p.m., and 11 a.m. to 7 p.m. The utility fuelers work second and third shift, 7 days a week, with one of the fuelers working full time and the other part time. The dispatchers' schedules vary. Usually, just one dispatcher is on duty at a time. There are times, however, when one of the Paratransit Operations Specialists will assist in performing dispatch duties. Although the times of the shifts of the dispatchers are not entirely clear from the record, it appears that Dispatchers Copeland and Meyer work 6 p.m. to 2:30 a.m. on weekdays, Dispatcher Neely comes in at 4 a.m. during the week, and Dispatchers Copeland and Harris work

on the weekends. The managers are scheduled to work from 8 a.m. to 5 p.m., Monday through Friday, but also work weekends at times.

Dispatchers, mechanics, utility fuelers, and drivers are all hourly paid, with the exception of the mechanic, Bobby Kerr, who is salaried. The record does not disclose why Kerr is salaried or the amount of his salary. Dispatchers earn between \$10.50 and \$12.50 per hour. Mechanics earn approximately \$5 more per hour than the drivers and the drivers earn between \$9.62 and \$12.52 per hour. The record does not reflect the utility fuelers' wage rate.

The mechanics punch a separate time clock from the drivers. The dispatchers do not punch a time clock. It is unclear from the record whether the utility fuelers punch a time clock. The operators, mechanics, and utility fuelers are all covered by the rules enumerated in the Employer's employee handbook.

Mechanics

The four mechanics are Bobby Kerr, Tom Preston, Steven Webb, and a fourth individual whose name is not disclosed in the record. They perform mechanical work on all of the vehicles used by the Employer. This work includes regular safety inspections, servicing, and repair of the Employer's vehicles. The mechanics have a service truck which they use to travel to buses that are having mechanical problems while on the road and to tow in disabled buses. If a bus breaks down while servicing a route, a mechanic will often drive a new bus out to exchange with the driver, so the driver can continue on his route.

When a driver suspects there is a mechanical problem with his bus, he indicates this on a "driver's vehicle inspection" (DVI) report which is submitted to the maintenance department. Sometimes, a driver will orally tell a mechanic about a suspected mechanical problem with a bus. Whether the mechanics are notified of a suspected problem orally or in writing, they respond by pulling the bus into the garage or they may check it out in the lot. After performing a repair, the mechanics may drive the bus to ensure that it is running properly. Drivers commonly talk to the mechanics about the status of repairs on the buses.

The record reflects that at least one of the mechanics, Steven Webb, maintains ASE certifications, however, the record does not indicate with any degree of certainty whether other mechanics maintain such certifications. The mechanics have traditionally purchased and used their own tools, but the Employer recently announced that it will begin providing a tool allowance for the mechanics.

Kerr is the only salaried mechanic. He also performs some job duties with respect to the utility fuelers. General Manager Davis testified that Kerr possess the authority to schedule, discipline, and evaluate the performance of the utility fuelers, but there was no testimony to indicate that the exercise of these duties involved any use of independent judgment. Davis testified that Kerr created the shifts of the fuelers and may change them in the future should the Employer's operational needs change, but there is no evidence that Kerr was required to use independent judgment in the performance of these tasks. Webb testified that he has been told by Maintenance Supervisor Morales that Kerr is "in charge" when he is not on the premises, but did

not explain what specific authority Kerr has or whether being “in charge” requires the use of independent judgment.

Utility Fuelers

The record is sparse with regard to the utility fuelers. However, it appears that there are two utility fuelers who are responsible for cleaning the grounds and fueling the buses at the Employer’s facility. They perform their duties under the direction of the mechanic, Bobby Kerr. However, the record does not provide any detail about how Kerr “directs” the utility fuelers. As previously noted, they work on the second and third shifts, but the record does not reflect their wage rate.

Dispatchers

The five dispatchers in dispute are: Lois Neely, Rose Stokes, Allieci Harris, Tania Copeland, and Shannondoa Meyer. The dispatchers work in the dispatch office. Drivers are not supposed to enter this office, but do so on occasion. Dispatchers are in radio contact with the drivers as they perform their routes. Through this radio contact, the dispatchers respond to concerns raised by drivers and ensure that service to customers is timely. After the drivers pull out of the facility’s parking lot, the dispatcher contacts them twice per hour by radio to determine where they are and whether they are running on schedule. The dispatcher enters the drivers’ times into a computer system that estimates when the next pick up or drop off will take place. The dispatchers have access to a program called “Orbital” which is a computerized mapping system that shows the approximate location of the driver, and to “Trapeze,” which has an electronic version of the drivers’ manifests. If a dispatcher sees that a driver is running behind schedule and is going to have a difficult time making a pick up, they may dispatch another driver or re-route another driver already performing his route. Dispatchers do not have the authority to create an entirely new route for a driver. If a driver is going to be late for a pick up, the dispatcher will call the customer to advise him of the delay.

On weekdays, the operations specialists distribute the manifests and keys to the drivers. On weekends, the manifests are usually pre-printed and placed into binders with sets of keys to the buses that will be used to perform a given route, usually by the dispatcher. Prior to the hearing in this matter, the Trapeze system was upgraded and dispatchers lost the ability to print out manifests. Prior to the Trapeze upgrade, dispatchers occasionally had to print out manifests on weekends and place keys with them. Dispatcher Harris testified that when she performed this duty, she determined which driver would be assigned to a given vehicle by giving him the same vehicle he had the previous day, but that she sometimes departed from this procedure when the bus was blocked in by other vehicles or the driver requested a different vehicle. In addition, Dispatcher Copeland testified that she distributed the keys by driver preference.

An unspecified number of “show drivers” or “extra board drivers” are assigned to each shift. These are drivers who do not have an assigned route when they report. According to General Manager Davis, the dispatchers have the authority to assign routes to drivers or to send them home if there is not sufficient work. According to Davis, if there is insufficient work, the dispatcher is required to send these drivers home. When certain routes begin to run late, the

dispatcher takes trips from existing routes to create new routes to be performed by the extra board drivers. General Manager Davis initially testified that Dispatchers assign the extra board drivers to routes based upon an assessment of their skills and the difficulty of the route, but later testified that the extra board drivers are assigned routes in the order of their seniority. The Operations Specialist II determines how many extra board drivers will be scheduled for any given shift. As new routes are created, they are distributed to the extra board drivers in the order of their seniority.

The Employer suggests that dispatchers may issue “disciplinary notices” and “operator’s violation sheets” to drivers that are considered to be verbal or written warnings under the Employer’s progressive discipline policy and constitute the first step of discipline. The record, which includes a copy of the Employer’s handbook and the collective-bargaining agreement, does not contain a description of the Employer’s progressive discipline plan. However, the handbook’s attendance policy indicates that the first “miss out” is punished by verbal warning, the second by written warning and counseling, the third by suspension, and the fourth by separation. “Disciplinary notices” have space to indicate whether the warning is verbal, written, or second written. The Employer submitted one “disciplinary notice” as an exhibit, but it was signed by an operations supervisor and a dispatch supervisor, not a dispatcher. Dispatchers Harris and Copeland testified that they have never issued disciplinary notices or been told that they have the authority to issue disciplinary notices. Davis testified that a driver was discharged based upon Rose Stokes’ concern that he was unable to perform his duties, but later testified that he was uncertain whether Stokes was a dispatcher or operations supervisor at the time this occurred. Stokes did not testify on this issue.

Operator violation sheets may be filled out by dispatchers or supervisors. The sheets document the occurrence of certain conduct or an incident that was witnessed. Once a dispatcher fills out an operator violation sheet, the dispatcher merely submits it to the Human Resources Department or the Paratransit Operations Specialist III. Eventually, these documents may end up in the employees’ personnel file, but the dispatchers do not place them in the file. When dispatchers fill out an operators violation sheet, they may not know whether the operator has any prior violations. Dispatchers Harris and Copeland testified that they have submitted “operators violation sheets.” Both dispatchers testified that when they completed these forms, they merely submitted them to the Operations Specialist III, and took no other action. Dispatchers Harris and Copeland testified that they never warned the operators in question before or after completing the violation sheets and never advised the operator that they had submitted the sheets. Dispatchers Copeland and Harris testified that they have never issued oral or written warnings and that management has never told them that they possess this authority. Dispatcher Copeland testified that when she completes and submits operators’ violation sheets, she makes no decision or recommendation as to what discipline, if any, should be taken against the operator. One of the operator’s violations sheets that was submitted as an exhibit noted that an operator was running late and recommended retraining or replacement. Davis acknowledged, however, that he was uncertain whether the individual who filled out this form was a dispatcher or an operations supervisor at the time the form was filled out.

Davis also testified that the dispatchers can authorize operators’ absences by virtue of what they write on the operator’s violation sheet, but the operator’s violation sheet submitted by

the Employer in conjunction with this testimony was simply a sheet with a box labeled “call off” marked and a note that the driver in question had gone to the emergency room. Another “operator’s violation sheet” submitted by the Employer had a box marked “late/miss out” checked and a written note that the driver reported late because her first pick up was not until four hours into the shift and she did not want to sit while on the “clock” with nothing to do. Neither of these sheets indicated whether the “miss out” was excused or not.

Although the Employer submitted an operator’s violation sheet that was filled out on the day of the hearing in this matter, Harris testified that the Employer’s last operations manager had told her not to fill out operator’s violation sheets anymore and that the Operations Specialists would assume this duty. According to Harris, dispatchers now just record “unusual” events on “incident sheets” and attendance events on attendance sheets. Dispatchers keep a log of “incidents,” i.e., anything out of the ordinary. Examples of incidents would include operators being unreachable on the radio and verbal altercations with customers. At the end of the day, the log is turned into the Paratransit Operations Specialist III. The record does not reflect whether the dispatchers make any recommendations on the logs. When vehicle accidents occur, the dispatcher communicates with the driver involved to fill out an accident report and one of the road supervisors goes to the scene to investigate. If a bus has mechanical problems, the dispatcher notifies a mechanic so that he can come to the dispatch office and talk to the driver. When an employee forgets to punch his timecard, he is given a “notification of missed punches” by the dispatcher. He fills in his time on this sheet and the dispatcher signs, verifying that the employee was at work that day.

The record reflects that dispatchers play a role with regard to the Employer’s drug and alcohol policy, dress code and attendance policy. A dispatcher may require a driver to take a drug or alcohol test if she believes the driver to be under the influence. General Manager Davis testified that the dispatchers received training in September 2002 regarding the detection of drug or alcohol use. If a dispatcher sees that a driver is not dressed in accordance with the dress code, she may send him home for the day. If a driver reports more than a minute late, the dispatcher may send the person home or keep him there and use him at the bottom of the extra board for the day. However, the dispatchers are not required to exercise independent judgment, they perform their duties according to established guidelines.

Dispatchers are usually the highest ranking employees at the facility from 6 p.m. or 8 p.m. Friday evening until 4 a.m. Monday, and on weekdays from 6 p.m. until 4 a.m., but their responsibilities do not change during these times. The Operations Specialists II and III are on-call during this time. Dispatcher Copeland testified that she can call an Operations Specialist during these times to get authorization to call in drivers who would be working overtime to replace call-offs.

General Manager Davis testified that it was his understanding that the dispatchers attended a supervisor meeting held on January 28, 2003. However, he admitted that he was not present at this meeting.

The record reflects that overtime for a driver can result in the context of route control, i.e., when a dispatcher adds another trip to an existing route or the “moving” of an existing route.

However, Dispatcher Copeland testified that the only time she could cause a driver to work overtime is if a driver called off and she called in a new driver from the bottom of the seniority list. To do this, however, she testified that she must get prior approval from an Operations Specialist II or III.

The record reflects that dispatchers have some involvement with employee “grievances.” Although General Manager Davis initially testified unequivocally that dispatchers do not have the authority to resolve grievances, he later testified without giving any specific examples, that they resolve “informal grievances” involving drivers who are unhappy with their vehicles and disputes among the operators or between operators and customers. The record does not reflect how the “informal grievances” are resolved by the dispatchers.

General Manager Davis testified that the Employer plans to convert the current dispatchers into Paratransit Operations Specialists I effective July 1, 2003 and to eliminate the dispatcher job classification. The dispatchers were notified of this planned change in a meeting held on May 17, 2003. The Employer’s plan is to have the dispatchers rotate the duties of dispatching with assigned field work. The field work would consist of performing evaluations of operators that are currently performed by the road supervisors. The proposed change also would entail the current dispatchers evaluating new operators and serving on grievance committees on behalf of management. According to Davis, the current dispatchers will have authority to impose discipline.

III. THE LAW AND ITS APPLICATION

A. The Briggs Indiana Issue

Prior to considering the substantive issues, I will first address the Employer’s argument that the Petitioner has waived its right to represent the mechanics, dispatchers or utility fuelers. In support of its position, the Employer argues that the waiver can be found in the current contract and in the Petitioner’s oral promise during contract negotiations. Thus, the Employer cites *Briggs Indiana Corp.*, 63 NLRB 1270 (1945) for the proposition that the Petitioner may not now seek to represent the dispatchers and mechanics inasmuch as its current collective-bargaining agreement covering the drivers specifically excludes these classifications from the unit.

It is true that a petitioner waives its right to file a petition to represent certain classes of employees when it has made an express agreement with the employer that it will not seek to organize those employees. *Lexington House*, 328 NLRB 894 (1999). However, I do not find Healy’s conclusory testimony that the Petitioner promised that it would not seek to represent the dispatchers and mechanics sufficient to find that this petition is barred under *Briggs Indiana*. In so finding, I believe that Healy’s testimony simply indicates that the parties were merely defining who was covered by the collective-bargaining agreement. Moreover, it is well established that a promise not to organize a certain class of employees will not be implied from a unit exclusion or an alleged understanding of the parties during contract negotiations. *Budd Co.*, 154 NLRB 421 (1965); *Women and Infants Hospital of Rhode Island*, 333 NLRB No. 65 (2001); *Cessna Aircraft Co.*, 123 NLRB 855, 857 (1959). Accordingly, I find that there is no bar to the processing of this petition.

B. Community of Interest of Mechanics, Utility Fuelers, Dispatchers, and Drivers

It is true that the mechanics, utility fuelers, dispatchers, and drivers are assigned to different duties within the Employer's organization and have different work schedules and pay rates. It is significant, however, that the employees involved here work at or from the same facility, have significant and frequent work-related contact with each other, and repair, service, operate, or dispatch the same equipment, i.e., buses. Although other groupings of these employees may also be appropriate, I find that the mechanics, utility fuelers, and dispatchers constitute essentially all unrepresented employees at the Employer's Columbus, Ohio location and share a sufficient community of interest along with the drivers to constitute a voting group entitled to vote on whether they wish to be represented along with the drivers. In reaching this conclusion, I note that the Board has a long history of adding residual employees to an existing bargaining unit when a petition seeking to represent them is filed by the incumbent union. *Phototype, Inc.*, 145 NLRB 1268, 1273 (1964); *United States Steel Corp.*, 137 NLRB 1372 (1962); *St. Johns Hospital*, 307 NLRB 767, 768 (1992). Moreover, the Board has held that a "plant-wide" or "wall-to-wall" unit is presumptively appropriate and that the "burden of proving that the interests of a given classification of employees are so disparate from those of others that they cannot be represented in the same unit rests with the party challenging the unit's appropriateness." *Livingstone College*, 290 NLRB 304 (1988); *Airco, Inc.* 273 NLRB 348, 349 (1984). I find that the Employer has not met its burden here.

The Employer argues in its brief that it has 43 collective-bargaining agreements with various labor organizations nationwide, and that none of these contain units that combine dispatchers, operators, and mechanics. I note, however, that it is well settled that there are frequently many ways in which employees of a given employer may be properly grouped for collective bargaining purposes. *General Instrument Corp. v. NLRB*, 319 F.2d 420, 422-3 (4th Cir. 1963), cert. denied 375 U.S. 966 (1964); *Mountain Telephone Co. v. NLRB*, 310 F.2d 478, 480 (10th Cir. 1962). Furthermore, the bargaining history at other plants of the same employer or in a given industry is not controlling in relations to the bargaining unit of a particular facility. *Big Y Foods*, 238 NLRB 855 (1978); *Miller & Miller Motor Freight Lines*, 101 NLRB 581 (1953). Accordingly, I find that the employees sought by the Petitioner constitutes an appropriate voting group entitled to vote on whether they wish to be represented by the Petitioner in the current unit of drivers, unless they are properly excluded from the voting group as supervisors within the meaning of the Act.

C. Supervisory Status of Dispatchers

Before examining the specific duties and authority of the dispatchers, I will review the requirements for establishing supervisory status. Section 2(11) of the Act defines the term supervisor as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such

authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet the definition of supervisor in Section 2(11) of the Act, a person needs to possess only 1 of the 12 specific criteria listed, or the authority to effectively recommend such action. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000).

The burden of proving supervisory status lies with the party asserting that such status exists. *Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001); *Michigan Masonic Home*, 332 NLRB No. 150, slip op. at 1 (2000). The Board has frequently warned against construing supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See, e.g., *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997). Lack of evidence is construed against the party asserting supervisory status. *Michigan Masonic Home*, supra, slip op. at 1. Finally, mere inferences or conclusionary statements without detailed specific evidence of independent judgment, are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g., *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska*, 334 NLRB No. 34, slip op. at 4 n. 8 (2001). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See, *Michigan Masonic Home*, supra, slip op. at 3; *Chevron U.S.A.*, 309 NLRB 59, 61 (1992). Moreover, the fact that an individual may exercise supervisory authority in the future does not establish a basis for excluding an individual from a unit at the present time. *Weaver Motors, Inc.*, 123 NLRB 209 (1959).

In considering whether the dispatchers possess any of the supervisory authority set forth in Section 2(11) of the Act, I note that in enacting this section of the Act, Congress emphasized its intention that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors, and not “straw bosses, leadmen, set-up men and other minor supervisory employees.” *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). I conclude, for the reasons discussed below, that the five dispatchers in issue here are not statutory supervisors.

The Employer asserts that the dispatchers possess many of the indicia of statutory supervisors. Thus, the Employer contends that they discipline employees, assign and responsibly direct employees, and resolve informal grievances. I find, as detailed below, that dispatchers do not in the exercise of their duties use independent judgment or responsibly direct within the meaning of the Act. Further, they cannot effectively recommend discipline or the adjustment of employee grievances.

1. Disciplinary Authority

The Employer contends that the dispatchers have the authority to discipline drivers by virtue of their ability to issue “disciplinary notices” and “operator’s violation sheets.” Both of the dispatchers who testified at the hearing, however, state that they have never issued “disciplinary notices” and have never been told that they are authorized to issue disciplinary notices. The disciplinary notice submitted by the Employer as an exhibit was not signed by a dispatcher, but rather, by an operations supervisor and a “dispatch supervisor.” Thus, the evidence, at best, is inconclusive as the issue of whether dispatchers can issue disciplinary notices and there is no evidence that the issuance of these notices involve the exercise of independent judgment.^{3/}

Further, the “operator’s violation sheets” appear to be more akin to a report of misconduct rather than actual discipline. Thus, the record indicates that the dispatchers merely record possible infractions on these sheets and submit them to the Operations Specialist III, without any recommendation of discipline. It is well established that the mere reporting of infractions or misconduct does not confer supervisory status. *Ken-Crest Services*, 334 NLRB No. 63 (2001); *VIP Health Services v. NLRB*, 164 F.2d 644 (D.C. Cir 1999); *Vencor Hospital*, 328 NLRB 1136, 1139 (1999). Even if these “operators violation sheets” could be construed as warnings, oral or written warnings that are merely records of verbal instruction which neither recommend discipline nor put employees on notice that discipline will ensue in the event of additional infractions do not affect the employees’ status and are not evidence of supervisory authority. *Ryder Truck Rental, Inc.* 326 NLRB 1386 (1998). The Employer also contends that the dispatchers can “excuse” drivers’ absences by virtue of what they write on the operator’s violation sheets but once again, it appears that the dispatchers merely record that the driver was absent and what the driver’s excuse was for the absence. There is no notation on these sheets indicating that the dispatcher actually decided whether the absence was excused. In any event, the testimony of Dispatcher Harris was that she no longer has the authority to issue even an operator’s violation sheet.

With regard to the Employer’s argument that dispatchers are authorized to order employees to leave if they are intoxicated, late for work, or in violation of the dress code, it is well established that the authority to send employees home for egregious and/or obvious infractions requires little independent judgment and does not confer supervisory authority. *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995); *Northcrest Nursing Home*, 313 NLRB 491 (1993); *Great Lakes Towing Co.*, 165 NLRB 695 (1967). Moreover, it is settled that the authority to order an employee to leave work, under established guidelines, is not the authority to effectuate the kind of ultimate personnel decisions that indicate supervisory status. *Quadrex Environmental Co., Inc.*, 308 NLRB 101 (1992); *NLRB v. Kentucky River*, supra. The Employer makes much of the dispatchers’ authority to issue “notifications of missed punches.” It is clear from the record, however, that these forms merely involve the dispatcher notifying an employee that he forgot to punch his time card and then signing the form, verifying that the driver worked that day. Authority to correct routine, ministerial errors such as timesheet errors is merely a clerical function and does not demonstrate supervisory status. *Quadrex Environmental Co., Inc.*,

^{3/} The record does not reflect who or what is a dispatcher supervisor.

supra at 102. Accordingly, I conclude that the dispatchers do not presently have the authority to discipline employees.

Although there was testimony in the record that the Employer plans to change the duties of the dispatchers and convert them into Operations Specialists I, who will have the authority to suspend employees, I find that these proposed changes are speculative and I will not find supervisory status based upon duties that the dispatchers may or may not be assigned at some point in the future. As the Board held in *Southwestern Bell Telephone*, 222 NLRB 407, 411 (1976):

[E]vidence that the individuals . . . actually perform the functions asserted is the only real way to determine whether they have indeed been assigned additional duties. . . . [O]ur determination . . . must be based on what the individuals filling those classifications actually do now, (at the time of the hearing) as opposed to what they speculatively may be doing some time in the future.

The cases cited by the Employer in its brief are inapposite. In *Frito Lay, Inc.*, 177 NLRB 820 (1969), the Board held that an employer did not violate Section 8(a)(5) of the Act when it refused to bargain with a union over a unit that had been rendered inappropriate based upon the elimination of common supervision over multiple sites. In *Mahoning Mining Co.*, 61 NLRB 792 (1945), the Board found that a mining company did not violate Section 8(a)(5) of the Act when it, in good faith, changed its business structure after an appropriate bargaining unit was established. Both of these cases dealt with changes that had actually occurred, not changes that were merely contemplated. See *Weaver Motors, Inc.*, *supra*.

2. Assignment and Direction of Work

With regard to the assignment and direction of work, the record discloses that the types of assignment and direction given by the dispatchers are merely routine and do not require the use of independent judgment. See, *N.L.R.B. v. Kentucky River*, *supra*. In determining whether individuals possess true supervisory indicia, utilizing independent judgment, the Board looks for whether there are established constraints or guidelines under which the individuals work and the accountability of the individuals whose supervisory status are in dispute. *Providence Hospital*, 320 NLRB 717 (1996).

The Board has held that the dispatching of buses and the assignment of bus runs and drivers to such runs are normally routine matters that do not require the responsible direction of other employees. *New England Transp. Co.* 90 NLRB 539 (1950). The instant case appears to be no exception. If a dispatcher sees that one driver is running behind, she may direct another driver to make an extra trip, but this does not entail the use of any independent discretion. When dispatchers hand out keys to drivers on the weekend, they do so based upon such criteria as what bus the driver prefers, what bus the driver used most recently, and which buses are blocked in by other buses. This kind of mundane authority does not involve the use of the type of independent judgment necessary to support a finding of supervisory authority. Similarly, there is no significant discretion involved in the dispatchers' determination to use the extra board drivers or

to send them home. If there are sufficient trips, the drivers are utilized, otherwise they are released. Extra board drivers are assigned trips based simply on their seniority, not on any assessment by the dispatcher of their abilities. The dispatchers' discretion in utilizing the extra board drivers is constrained by standing orders to send drivers with no work home. I find that the dispatchers do not have the authority to responsibly direct employees.

3. Resolving Grievances

In its brief, the Employer argues that dispatchers possess the authority to resolve grievances. In support of this, the Employer ignores General Manager Davis' clear testimony that dispatchers do not resolve formal grievances but cites his testimony that they resolve "informal grievances" such as instances where drivers are unhappy with their vehicles or where drivers have disputes with each other or customers. General Manager Davis did not give any specific examples of instances in which dispatchers resolved "informal grievances." It is well settled that the limited authority to resolve minor disputes and personality conflicts between employees is insufficient to establish supervisory status. *Ken-Crest Services*, 335 NLRB No. 63 (2001); *Riverchase Health Center*, 304 NLRB 861, 865 (1991). I find that the Employer has not established that dispatchers have the authority to resolve anything more than minor disputes which does not establish supervisory authority.

4. Other Indicia

The Employer contends that the dispatchers are statutory supervisors because they attended a supervisory meeting, are sometimes the highest ranking officials on site, and keep time for the operators. However, it is well settled that the foregoing are merely so-called "secondary indicia" of supervisory status. See, *Chevron U.S.A. Inc.*, 309 NLRB 59 (1992). Thus, because of my findings that dispatchers lack the authority to engage in any of the supervisory activities enumerated in Section 2(11) of the Act, the presence of these secondary indicia is irrelevant. I note, however, they apparently do not regularly attend supervisory meetings and other management officials are most always at the facility or available by telephone if a problem occurs.

D. Bobby Kerr's Supervisory Status

At the hearing in this matter, but not in its brief, the Petitioner agreed that Mechanic Kerr is a supervisor of the utility fuelers. In its brief, the Employer contends that Kerr is not a supervisor. Although General Manager Davis testified that Kerr schedules, disciplines, and evaluates the utility fuelers, the record does not reflect that Kerr exercises any independent judgment in performing these duties. It is unclear what effect Kerr's evaluations have on the utility fuelers and whether the discipline imposed by Kerr affects the utility fuelers' status as employees or requires the use of independent judgment. Accordingly, inasmuch as the Petitioner is contending that Kerr is a supervisor, it is the Petitioner's burden to demonstrate that he possesses at least one of the criteria enumerated in Section 2(11) of the Act. *NLRB. v. Kentucky River*, supra. I find that the Petitioner has failed to carry its burden. Furthermore, it appears that, with the exception of Kerr's responsibilities with respect to the utility fuelers, that he performs the same duties as the other mechanics. In sum, there is no evidence that Kerr exercises independent judgment with respect to any supervisory indicia. Therefore, my findings with

regard to the community of interest factors for the other mechanics apply to Kerr as well, and I find that he is not a supervisor and is properly included in the voting group.

IV. CONCLUSION

Based on the foregoing, the record as a whole, and having carefully considered the arguments of the parties at the hearing and in their briefs, I find that the Employer has failed to demonstrate that the Petitioner agreed not to seek to represent the dispatchers or mechanics or that the dispatchers are statutory supervisors. Likewise, the Petitioner has failed to establish that Kerr is a supervisor. Finally, the Employer's contention that the employees covered by the petition do not have a sufficient community of interest with the drivers to warrant their inclusion in the same unit if they vote to be represented by the Petitioner in the drivers' unit lacks merit. Accordingly, I find that the dispatchers, mechanics and utility fuelers constitute an appropriate residual voting group and I will allow them to vote on whether they wish to be included in the current represented unit of drivers.

V. EXCLUSIONS FROM THE VOTING GROUP

The parties agree, the record shows, and I find that the following persons are supervisors within the meaning of the Act: Barton Davis, general manager; the operations manager; the office manager/human resources; Chris Morales, maintenance manager; Corwin Gibbs, safety/training manager; Mike Weidger, paratransit operations specialist III; Ken Rollins, paratransit operations specialist II; James Sherrod, paratransit operations specialist I, and Marsha Newman, customer service supervisor. Accordingly, I will exclude them from the voting group.

Furthermore, the parties are in agreement that the customer service representatives should not be included in the unit. Therefore, I will exclude them.

VI. CONCLUSIONS AND FINDINGS

Based upon the entire record ^{4/} in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

^{4/} My finding with regard to the dispatchers renders moot the Employer's argument that the Region should conduct an investigation of whether the showing of interest was tainted by supervisory involvement. In this regard, the Employer argues that at the hearing a dispatcher testified that she signed an authorization card on behalf of the Petitioner. There was no evidence that the dispatcher solicited any other cards. In any event, I note that the Board's *Casehandling Manual, Part Two, Representation Proceedings* clearly states at Section 11184.1 that "if a party seeks at the hearing to introduce evidence of alleged fraud, misconduct, supervisory taint, or forgery in obtaining the showing of interest, the line of questioning should not be permitted." Additionally, the casehandling manual at Section 11028.1 provides that the party alleging taint of the showing of interest must present its evidence of same to the Regional Director in a timely manner for an administrative investigation during the preliminary investigation of the petition. Further, *DeJana Industries, Inc.*, 336 NLRB No. 127 (2002), relied on by the Employer, is inapposite because of my findings that the dispatchers are not supervisors within the meaning of the Act.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute an appropriate voting group:

All full-time and regular part-time dispatchers, mechanics, and utility fuelers working at the Employer's 101 Phillip Road, Columbus, Ohio facility, excluding all drivers, customer service representatives, all other employees, office clerical workers, professional employees, guards and supervisors as defined in the Act.

If a majority of the employees in this voting group vote for the Petitioner, they will be taken to have indicated their desire to be included in the existing drivers unit currently represented by the Petitioner. If a majority of them vote against the Petitioner, they will be taken to have indicated their desire to remain unrepresented. In either event, the undersigned will issue a certification of results of election with respect thereto.

VII. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the voting group above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Transport Workers of America, Local 212, AFL-CIO. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. VOTING ELIGIBILITY

Eligible to vote in the election are those in the voting group who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Voting group employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **July 15, 2003**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (513) 684-3946. Since the list will be made available to all parties to the election, please furnish **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. NOTICE OF POSTING OBLIGATIONS

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VIII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EDST on **July 22, 2003**. The request may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 8th day of July 2003.

/s/ Earl L. Ledford, Acting Regional Director

Earl L. Ledford, Acting Regional Director
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